

No. 42319-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**STEVEN GRANT WILLIAMS,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Was there insufficient evidence to sustain the aggravating factors found by the jury?
- B. Did the deputy prosecutor commit misconduct, prejudicing Williams and denying him a fair trial?
- C. Did Williams receive ineffective assistance from his trial counsel?

## II. STATEMENT OF THE CASE

D.R. is a seven year old boy who lives with his grandmother, Joanne, and his grandfather, Ronald.<sup>1</sup> RP 41-42.<sup>2</sup> D.R. lived with Joanne through an agreement Joanne made with D.R.'s mother, Sarra. RP 67. Joanne and Ronald were living in Davenport, Washington, in July 2010. RP 65-66. D.R. was struggling in school. RP 78-79. D.R. was on an individualized education plan, which called for D.R. to receive special help with math, reading and writing. RP 79. To determine what sort of help D.R. would need he was subjected to a variety of different testing, including, learning examinations, psychological examination and other standard tests.

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<sup>1</sup> D.R. is referenced by his initials due to his tender age and the nature of the case. His relatives will be referred to by first name, also in an attempt to protect D.R.'s identity. No disrespect is intended. Further, references to D.R.'s age will be as it was back in July to August 2010.

<sup>2</sup> There are four verbatim report of proceedings consisting of six volumes. The jury trial contains three volumes, pages sequentially numbered, that the State will refer to as RP. The sentencing hearing will be referred to as SRP. Any additional hearing will be referred to by date.

RP 82. The testing demonstrated that D.R. needed additional help but did not reveal a cause for why D.R. was behind the other students, such as a diagnosis of autism or Asperger's syndrome. RP 82-83. D.R. started receiving special help in kindergarten. RP 79. Despite the additional help, D.R. did not successfully complete the first grade. RP 78-79.

D.R. went to visit his mom in Chehalis at the end of July in 2010. RP 67. When D.R. left Joanne's house he had a burn on his leg but no other visible markings or bruises on him. RP 68. Sarra brought D.R. back to Chehalis where she was living with her boyfriend, Steven Williams. RP 202-03. Sarra and Williams had been dating for a couple years and had moved to Washington about four months prior to D.R.'s visit. RP 202, 229-30. Sarra was working the graveyard shift, which left Williams as D.R.'s primary caregiver while D.R. was visiting. RP 205, 309. D.R. stayed with Sarra and Williams for about three weeks. RP 306. There was no one else living with Williams and Sarra during the course of D.R.'s visit. RP 207.

Sarra and Williams had had a conversation regarding appropriate discipline of D.R. prior to D.R.'s visit. 209. Williams would be handling the discipline, as he was in charge of watching

D.R. RP 207-08. Sarra gave Williams permission to spank D.R. with an open palmed hand on D.R.'s butt. RP 208. Sarra did not give Williams permission to spank D.R., or use other forms of physical discipline, for problems with D.R.'s hygiene or difficulty with homework. RP 231-32.

According to Williams, when D.R. arrived in Chehalis his personal hygiene was not up to Williams's standards and Williams thought D.R.'s hair smelled like feces. RP 310-14; Ex. 21. Williams also found D.R. to be deficient in other areas. RP 328-29. Williams said D.R. did not know how to flush the toilet after himself or put the toilet seat down. RP 328; Ex. 21. D.R. did not know how to bathe correctly, including washing his hair and his penis. RP 313-15, 328; Ex. 21. D.R. did not know how to properly brush his teeth. RP 311-12, 328; Ex. 21. D.R. did not know his ABC's, could not count to 10 and do math at grade level. RP 329; Ex. 21. D.R. did not know how to put the dishes away. RP 329. D.R. was spoiled by his grandmother, watched too much television and did not have any chores. RP 329. In order to address D.R.'s deficiencies, Williams felt it was his duty as D.R.'s primary caregiver to teach D.R. how to do these things. RP 330.

Williams attempted to correct and train D.R. in regards to D.R.'s personal hygiene issues. RP 312-15; Ex. 21. Williams found training D.R. to properly wash himself in the shower particularly frustrating. RP 315-16, 330-32; Ex. 21. While trying to get D.R. to shower, Williams told D.R., "stop acting like a little asshole and get in the water." Ex. 21. Williams also said he was, "at my fucking wits end, trying to figure out how to get this kid to clean himself properly." Ex. 21. Williams described the difficulty of bathing D.R. as being more difficult than trying to give a cat a bath and that D.R. became so combative he reached a "degree of animal savagery" he had not seen outside of a mental ward. RP 315, 331-32. Williams described D.R. as thrashing about, falling in the shower and banging his elbows. RP 331-33; Ex. 21. Williams explained that these falls in the shower caused D.R. to sustain bruising on his body. RP 333; Ex. 21.

Williams spanked D.R. about two days into D.R.'s visit. RP 211. Williams first spanked D.R. over his clothes, but when that did not get the desired effect, Williams had D.R. pull his pants down and gave D.R. three more swats on the butt. RP 318; Ex. 21. According to Williams he spanked D.R. about four times during the visit, with each spanking consisting of four to five swats to D.R.'s

bare bottom. RP 318; Ex. 21. The first spanking left a large hand sized bruise on D.R.'s bottom. RP 210, 321; Ex. 21. Williams then changed his approach and used a belt instead of his hand. RP 320; Ex. 21. When Williams struck D.R. with the belt he hit him between three to five times. RP 340; Ex. 21. As the bruise on D.R.'s butt began to heal, Williams wrote "stop staring" on it with a black marker as a joke. RP 327-28.

When D.R.'s visit ended Sarra met Joanne and Ron at the outlet stores in North Bend, Washington, to drop D.R. off on August 18, 2010. RP 68. Joanne saw D.R. and immediately noticed D.R. had two very black eyes. RP 68. D.R. had told Joanne during a phone call two days prior about the black eyes. RP 69. D.R. had told Joanne that the black eyes were caused by a lamp hitting him. RP 69. Sarra appeared to be acting nervous and scared. RP 85. RP 70, 85. Sarra said that the black eyes might have been caused by a vitamin deficiency. RP 70. Joanne and Ronald could see that D.R. had massive bruising all over his body. RP 70, 85. Ronald and Joanne decided to take D.R. to the hospital. RP 86-87. The closest hospital Joanne and Ronald found was Snoqualmie Valley Hospital. RP 70-71.

Dr. Halpner, an emergency room doctor at Snoqualmie Valley Hospital, examined D.R. on August 18, 2010. RP 21-23. Dr. Halpner found bruises, ecchymoses and contusions of various ages on D.R.'s shoulders, forearms, clavicle, left lower abdomen, both buttocks, legs, subconjunctival hemorrhage (blood present in the whites of his eyes), bruising on his penis and "stop staring" written in marker on his left buttocks. RP 28-29; Ex. 13. Photographs were taken to document D.R.'s injuries. Ex. 13. Dr. Halpner believed that D.R.'s injuries were not as the result of one traumatic event. RP 24. Dr. Halpner's diagnosis was that D.R.'s injuries were the result of non-accidental trauma, caused by assault which appeared to be a pattern of assault. RP 28-29. Dr. Halpner opined that D.R. was the "victim of something horrible" and sent D.R. to Children's Hospital in Seattle for a child abuse evaluation. RP 24-32.

While D.R. was at Snoqualmie Valley Hospital Detective Stonebraker spoke to him. RP 192. D.R. told Detective Stonebraker that Williams wrote on him and caused the bruises. RP 192. D.R. told Detective Stonebraker that he got his black eyes by being hit by a lamp while he was sleeping. RP 193. When Detective Stonebraker asked D.R. how he knew the lamp had hit

him, D.R. replied that Williams told D.R. the lamp had hit him. RP 193. D.R. said Williams whipped him "a million times." RP 193. D.R. also told Detective Stonebraker that Williams, "took him [D.R.] down to the living room in the home and had - - I don't know whether Steve had him undress or whatever, you know, [D.R.] did it himself or if Steve did. But he had him stand there naked when he bound his wrists together, covered his mouth with tape and put a bandana around his eyes and then proceeded to hit him on the front and back part of his body" with a belt. RP 194. D.R. showed Detective Stonebraker that his wrists were bound with the inside of his wrists facing each other. RP 199.

Later that day, Dr. Feldman, a child abuse expert at Children's Hospital, conducted a child abuse consultation and medical examination of D.R. RP 138-40. Dr. Feldman asked D.R. how he got injured and did not receive a response. RP 143. Dr. Feldman then asked D.R. when did it start and D.R. stated, "when he gets mad." RP 143. Dr. Feldman asked D.R. "who is he" and D.R. replied, "Steve." RP 143. Dr. Feldman asked D.R. one more time what had happened and D.R. made a series of statements to Dr. Feldman. RP 143. D.R. stated he had been hit with a belt, dunked in cold water, his head had been put in the toilet, he had

been put in a cold shower and he also indicated that his mouth had been taped and his wrists were bound together, facing each other. RP 143. D.R. also told Dr. Feldman he had been hearing big boy words. RP 144.

Dr. Feldman observed the same injuries Dr. Halpner had noted. RP 150-56; Ex. 14. There were so many bruises on D.R. that Dr. Feldman had to request someone else act as a scribe while he documented the bruises. RP 144. Dr. Feldman noted that D.R.'s entire back was a mass of different bruises which appeared to be of differing ages. RP 154. Dr. Feldman stated that the bruise on D.R.'s penis appeared to be bit patterned, as if struck by an impacting object. RP 154; Ex. 14. Photographs were taken to document the injuries. Ex. 14. Dr. Feldman stated that due to the distribution and character of the bruising on D.R., he would have had to have been beaten. RP 147. Dr. Feldman said the bruises were not typical of those sustained by a child doing their own activities. RP 145. The bruising on D.R.'s buttock would have required repeated blows. RP 155. The cause of D.R.'s black eyes and swelling was separate blows to each eye. RP 169. In Dr. Feldman's expert opinion, D.R. was the victim of child abuse, due to the location, character and number of bruises. RP 148, 164.

Due to the determination by the doctors that D.R. had been a victim of child abuse, D.R. was taken down to Olympia on August 19, 2010 to be interviewed by Ronnie Jensen, a Child Protective Services worker, and Detective Rick Silva of the Chehalis Police Department. RP 93, 239-241. D.R. was smiley, friendly and compliant. RP 244. D.R. told Ms. Jensen and Detective Silva that Williams helps him learn things like math and reading, being nice and not to be a cry baby. RP 245. Ms. Jensen asked D.R. how Williams teaches him and D.R. stated that Williams put him in the freezing cold shower to help him learn. RP 246. When Ms. Jensen asked D.R. what that was supposed to help D.R. learn, D.R. replied, "be nice to him, not fuss, not be like a cry baby." RP 246-47. D.R. also said Williams spanked D.R. for being a cry baby. RP 247. When asked if he told Williams the water was cold, D.R. said no and that Williams would not believe him because Williams thinks he is a liar. RP 247. D.R. told Ms. Jensen and Detective Silva that Williams spanked D.R. in the bathroom with a belt on the butt, hip, thigh and other parts. RP 247-50. D.R. also said Williams hit him on the back more than one time. RP 250. D.R. also explained that if things did not go right when Williams was trying to help him, D.R. would get "whacked." RP 251.

Ms. Jensen and Detective Silva stopped interviewing D.R. and began to take photographs of D.R.'s injuries. RP 252; Ex. 15. Detective Silva asked D.R. to put his chin up and asked D.R., how he got a bruise under his jawline. RP 253. D.R. "was standing and he kind of put his hand like in a downward motion and spread his thumb and his finger and...said..."Stop it or I'll fucking kill you." RP 253. Ms. Jensen asked D.R. what he was saying and D.R. said, "he choked me." RP 253. Later on, D.R. said he got that bruise from being choked and Williams told him, "You keep that up, I will kill you." RP 257. Ms. Jensen noted that D.R. had to put extra effort into getting his eyes to open up all the way for the pictures because they were very swollen. RP 254-55; Ex. 15. D.R. also said he got the bruise on the left side of his face from being smacked silly by Williams's hand. RP 256.

Williams was arrested by Chehalis police on August 19, 2010. RP 278-80. Williams was cooperative with the police and gave a statement to Detective Sergeant McNamara. RP 281; Ex. 21. During the course of his statement to Detective Sergeant McNamara, Williams changed the version of events and offered additional explanations. Ex. 21. During the statement Williams continually compared his childhood experiences to his treatment of

D.R. Ex. 21. Williams stated he had no idea how D.R. got his two black eyes. Ex. 21.

Williams was charged with Abuse of a Child in the Second Degree on August 20, 2010. CP 1-3. The State filed a Notice of Aggravating Factors for Purposes of Imposing an Exceptional Sentence on November 4, 2010. CP 4. The State was alleging three aggravating factors: (1) that Williams knew or should have known that the victim was particularly vulnerable or incapable of resistance, (2) Williams demonstrated or displayed an egregious lack of remorse, and (3) Williams's conduct during the commission of the crime manifested deliberate cruelty to the victim. CP 4. The State filed an amended information which included the aggravating factors. CP 5-7.

Williams exercised his right to a jury trial, which commenced on May 25, 2011 and lasted for three days. RP 1, 125, 296. The jury returned a verdict of guilty to the crime of Assault of a Child in the Second Degree as charged. CP 144. On the Special Verdict Form A, the jury determined that Williams had committed Assault of a Child in the Second Degree by intentionally assaulting D.R. and thereby recklessly inflicting substantially bodily harm on D.R. CP 145. The jury also determined, on Special Verdict Form A, that

Williams committed the crime of Assault in the Second Degree by knowingly inflicting bodily harm on D.R. which by design caused such pain or agony as to be the equivalent of that produced by torture. CP 145. The jury returned special verdicts finding all three of the aggravating factors the State had alleged. CP 146-148.

Williams was sentenced on June 27, 2011. SRP 1. The standard sentencing range for Williams was 31 to 41 months. CP 151. The State asked the trial court to sentence Williams to an exceptional sentence of 102 months. SRP 2. Williams and his trial counsel requested the trial court sentence Williams to the bottom of the standard range. SRP 3-4. The trial court sentenced Williams to an exceptional sentence of 102 months. SRP 4; CP 151. The trial court found that any one of the aggravating factors found by the jury, alone, would justify Williams's 102 month sentence. SRP 4-5; CP 158. Williams timely appeals his conviction. CP 160.

### III. ARGUMENT

#### **A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO FIND ALL THREE OF THE AGGRAVATING FACTORS SUBMITTED TO THE JURY BY SPECIAL VERDICT.**

A challenge to a jury's finding of an aggravating factor is reviewed under the sufficiency of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011)

*review denied*, 173 Wn.2d 1018 (2012). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, “the specific criminal intent of the accused

may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

An aggravating factor cannot be a factor inherent in the crime, as part of the elements necessary to prove the offense. *State v. Jennings*, 106 Wn. App. 532, 555, 24 P.3d 430 (2001) (citation omitted). An aggravating factor is something that distinguishes the behavior of the defendant from the behavior inherent in the commission of that crime. *Id.*

**1. There Was Sufficient Evidence Presented To The Jury To Sustain The Special Verdict That Williams’s Conduct During The Commission Of The Crime Manifested Deliberate Cruelty To The Victim.**

In order to sustain a special verdict for deliberate cruelty the State must show that the cruelty goes beyond that which would normally be associated with the commission of the crime. *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011), *citing State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). The deliberate cruelty cannot be inherent in the elements of the charged offense. *Id.* “Deliberate cruelty is gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.” *State v. Jennings*, 106 Wn. App. at 551 (citations omitted).

In *Jennings* a father pleaded guilty to two counts of assault of a child in the first degree for two disturbing assaults on his 12

day old daughter. *State v. Jennings*, 106 Wn. App. at 535-539. Jennings fractured his daughter's skull and tibia and inserted lamp oil into her veins. *Id.* at 536-37. Jennings also inserted a spoon into his daughter's vagina and rectum, stabbing the spoon so far into her orifices to cause her to froth at the mouth. *Id.* at 554. The court held that Jennings actions went beyond the necessary elements of assault of a child in the first degree and evidenced deliberate cruelty, justifying an exceptional sentence. *Id.* at 555-56.

In *Gordon* a confrontation between two adults escalated into a violent attack. *State v. Gordon*, 172 Wn.2d at 674. Gordon struck the victim, Lewis, in the face and as Lewis tried to run away he was struck by a friend of Gordon's. *Id.* Lewis was punched repeatedly by Gordon, causing Lewis to fall to the ground. *Id.* Once on the ground Gordon's friend kicked Lewis in the head and Gordon continued punching and kicking Lewis while he was on the ground. *Id.* A third assailant arrived, placed Lewis in a chokehold, while Gordon and his friend continued kicking Lewis. *Id.* Lewis died as a result of the beating and Gordon was charged with murder in the second degree, including the allegations of the aggravating factors of a particularly vulnerable victim and deliberate cruelty. *Id.* at 674-75. The court held that even though Gordon and

his friend had already struck Lewis numerous times causing Lewis to fall to the ground, they continued their viscous attack upon Lewis while he was down on the ground, thereby evidencing the deliberate cruelty of the attack. *Id.* at 681.

Williams's conduct throughout D.R.'s three week visit, particularly the escalation of violence and the mental anguish D.R. endured, manifested deliberate cruelty to D.R. To find a person guilty of Assault of a Child in the Second Degree the State must prove beyond a reasonable doubt:

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child.

RCW 9A.36.130(1)(a). In Williams's case the State elected to charge him under two prongs of RCW 9A.36.021:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

...

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture

RCW 9A.36.021(1)(a) and (f). The jury found Williams guilty under both prongs of Assault of a Child in the Second Degree as charged by the State. CP 145.

The repeated beatings for what Williams perceived was D.R.'s poor hygiene, beatings for D.R. doing poorly in his school work, the injury to D.R.'s penis, the significant beatings D.R. endured as evidenced by the bruising from the top of D.R.'s head down to his ankles, binding and beating a naked child and the choking and threatening to kill a seven year old boy exhibit deliberate cruelty and are above and beyond the necessary elements to find a person guilty of Assault of a Child in the Second Degree. See RP 28-29, 45-51, 150-56, 168-69, 193-94, 245-57, 318-322; Ex. 13, 14, 15, 21. Williams's conduct goes beyond the necessary element of causing pain or agony as to be equivalent to torture. If one was to take the continued beatings for the shower incidents alone, that would be sufficient to find the second prong of Abuse of a Child in the Second Degree as charged by the State. Williams took his viscous and relentless victimizing of D.R. to a whole other level, which exhibited his desire to inflict physical pain on D.R. as an end in itself.

Furthermore, forcing D.R. to take freezing cold showers and dunking him in cold water as a teaching tool to get D.R. to learn math, reading, not to act like a cry baby and be nice to Williams are not mere elements of the crime and the only possible explanation for the conduct was it was a means to inflict psychological and/or emotional pain on D.R. as an end in itself. See RP 143, 245-247. There was sufficient evidence presented to the jury to support and sustain the special verdict that Williams's conduct manifested deliberate cruelty to D.R.

**2. There Was Sufficient Evidence Presented To The Jury To Sustain The Special Verdict That Williams Knew, Or Should Have Known, That The Victim Was Particularly Vulnerable Or Incapable Of Resistance.**

A victim's particular vulnerability must be known to the defendant at the time of the commission of the crime. *State v. Ross*, 71 Wn. App. 556, 565, 861 P.2d 473 (1993) (citations omitted). A defendant must use that vulnerability as a substantial factor to accomplish the crime. *Id.* When focusing on vulnerability the courts often look to age, whether advanced age or extreme youth, a person's health or a disability that would make the person more vulnerable than other victims. *Id.* Extreme youth may be a factor considered, even if the crime requires the victims to be under

a certain age. *State v. Fisher*, 108 Wn.2d 419, 423-424, 739 P.2d 683 (1987). Where the crime requires a person to be under a certain age but there is a wide age range given, such as under 14 years of age, a seven year old, school age child, would not be considered a particularly vulnerable victim due to age alone. *State v. Woody*, 48 Wn. App. 772, 742 P.2d 133 (1987). Yet, “[v]ulnerability can be the result of characteristics other than the victim’s physical condition or stature.” *State v. Ross*, 71 Wn. App. at 565.

The courts have found a five and a half year old victim of indecent liberties to be a particularly vulnerable victim due to extreme youth. *State v. Fisher*, 108 Wn.2d at 424-25. The court in *Fisher* reasoned that while the Legislature contemplated a stiffer penalty for those who commit indecent liberties against a person under 14 years of age, the Legislature could not have considered the particular vulnerabilities of a specific victim due to their extreme youth. *Id.* at 424. In contrast, the court in *Woody* held that under the same indecent liberties prong (under 14 years of age) that a seven year old victim was not a particularly vulnerable victim due to his or her youth. *State v. Woody*, 48 Wn. App. at 777. The court explained that a child of school age has achieved a level of reason

that a younger child has not, thereby setting a grade-school aged child apart from a younger child. *Id.*

As stated earlier, age and disability are not the only factors in determining whether a person is particularly vulnerable or incapable of resistance. In *Gordon* due to the circumstances of the attack that the multiple assailants carried out on Lewis, the court held Lewis was particularly vulnerable. *State v. Gordon*, 172 Wn.2d at 680. The court found, “Lewis was unable to fight back or defend himself in any way. A jury could reasonably conclude that Lewis’s vulnerability – as a solitary victim – was a substantial factor in the commission of the crime, a vulnerability of which his assailants were aware by virtue of the fact that they placed him in that situation.” *Id.* at 680.

Williams knew D.R. was particularly vulnerable when Williams bound, blindfolded, covered D.R.’s mouth and then beat a naked D.R. because D.R. was obviously incapable of resistance and particularly vulnerable. RP 194-95. D.R. told Detective Stonebraker that Williams had D.R. stand naked in the living room and Williams bound D.R.’s wrist together, covered D.R.’s mouth with tape and put a bandana over D.R.’s eyes. RP 194. D.R. said Williams then struck him with a belt on the front and back of his

body. RP 194. D.R. also said Williams taped D.R.'s mouth shut so nobody could hear him scream or cry. RP 195. There is no other way to describe a bound, blindfolded and gagged victim of a beating than particularly vulnerable, regardless of that victim's age. There was sufficient evidence presented to the jury to support and sustain the special verdict that Williams committed the assault on a particularly vulnerable victim.

**3. There Was Sufficient Evidence Presented To The Jury To Sustain The Special Verdict That Williams Displayed An Egregious Lack Of Remorse.**

A criminal defendant's lack of remorse can be an aggravating factor if the lack of remorse is of an egregious nature. *State v. Ross*, 171 Wn. App. at 563 (citations omitted). A defendant's conduct by exercising his or her right to remain silent or refuses to admit guilt cannot be considered as a lack of remorse. *State v. Russell*, 69 Wn. App. 237, 251, 848 P.2d 743 (1993) (citation omitted). "Whether a sufficient quantity or quality of remorse is present in any case depends on the facts." *State v. Ross*, 71 Wn. App. 555.

In *Russell* the defendant was convicted of homicide by abuse of his 20 month old son. *State v. Russell*, 69 Wn. App. at 241. Russell beat his son several times in the head with brass

knuckles, hid his son's injuries from the mother by not allowing her in their son's room and later when the mother was able to check on the child, finding him pale, limp and moaning, Russell attempted to block the mother's efforts to obtain medical treatment for their son. *Id.* at 241-42. The testimony elicited at trial showed that Russell hid his son, who was suffering from the injuries Russell had inflicted on the child, interfered with medical personnel, insisted on cleaning the apartment where his son died prior to a follow-up visit by the police, told relatives he had fooled the police and within a few days of his son's death, Russell was ready and willing "to party." *Id.* at 752. Although Russell indicated remorse during the sentencing, the reviewing court found that the record supported the trial court's conclusion that any remorse shown lacked credibility and that Russell did exhibit an egregious lack of remorse. *Id.*

Ross pleaded guilty to reduced charges, by an *Alford*<sup>3</sup> plea, to one count of second degree murder and two counts of robbery in the first degree. *State v. Ross*, 71 Wn. App. at 560. The trial court sentenced Ross to an exceptional sentence based upon a number of aggravating factors, including egregious lack of remorse. *Id.* at 560-61. The reviewing court held that there was sufficient evidence

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<sup>3</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

to support the aggravating factor of egregious lack of remorse. *Id.* at 563-64. The court noted that while Ross testified he regretted killing the victim, the testimony of the community corrections officer and of Ross showed that Ross exhibited an extreme lack of remorse for the crimes he had committed. *Id.* at 563. The court noted that Ross continued to place blame on the criminal justice system for his crimes, the trial court did not believe that Ross was sorry and it was for the trial court to make any credibility determinations. *Id.* at 563-64.

Williams's attitude towards D.R., as exhibited during his own testimony and taped statement, show an egregious lack of remorse for the suffering he caused D.R. Williams admitted to causing the handprint bruise on D.R.'s bottom. RP 318-19. Williams admitted to writing "stop staring" on the healing handprint bruise to be funny. RP 327-28; Ex. 21. Williams blamed D.R. for the bruises that covered D.R.'s body, comparing D.R.'s alleged violent actions in the shower to animal savagery only seen by Williams before in a mental ward. RP 331-32. In describing the beatings he delivered upon D.R. to Detective Sergeant McNamara, Williams stated, "You know, and I just figured, you know what, these will heal up and I'll find a different way." Ex. 21.

Throughout his taped statement with Detective Sergeant McNamara Williams compared D.R. to Williams as a child, as if to shrug off any wrong doing and continually making this about Williams, not D.R. Ex. 21. Then there was the tone of Williams's voice and his mocking of D.R. that the jury was able to hear in the taped statement with Detective Sergeant McNamara. Ex. 21. In regards to showering Williams told D.R. to, "stop acting like a little asshole and get in the water." Ex. 21. Williams mocks D.R. when he describes D.R.'s reaction to being brought back into the bathroom for not flushing the toilet. Ex. 21. Williams continues to mock D.R. by laughing about how he had to show D.R. to pull back the foreskin of D.R.'s penis to properly clean it. Ex. 21. Williams goes as far as to exclaim, "He [D.R.] obviously had never seen the head of his dick before." Ex. 21. Williams continued on that D.R. was overindulged by his grandparents and needed to feel like he was actually worth something and act like a big boy. Ex. 21. Finally, Williams when explaining how D.R. was falling in the shower: "So I'm at my fucking wits end, trying to figure out how to get this kid to clean himself properly...And he's getting a few little bruises out of it. Bruises that, I got worse than that climbing trees when I was a kid." Ex. 21.

The jury heard from Williams, both in direct testimony and through the recorded statement he gave Detective Sergeant McNamara. The jury determines the credibility and weight to give Williams's statements. There was sufficient evidence presented to the jury to support and sustain the special verdict that Williams demonstrated or displayed an egregious lack of remorse.

**4. The Trial Court's Imposition Of An Exceptional Sentence Was Justified By Any One Of The Aggravating Factors.**

If a trial court finds there are substantial and compelling reasons to impose an exceptional sentence it may impose an exceptional outside of the standard range. RCW 9.94A.537. The trial court must enter written findings of fact and conclusions of law setting forth its reason for imposing the exceptional sentence. RCW 9.94A.537. If a trial court relies upon reasons that are not substantial and compelling for the imposition of an exceptional sentence, it exceeds its authority and the matter is required to be remanded for resentencing within the standard range. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). If the trial court indicates it would have given the same sentence for any of the aggravating factors, a finding that one of the factors is invalid

would not require the court to remand for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

The trial court in the present case stated at the sentencing hearing in regards to the exceptional sentence it gave Williams:

The jury also made specific findings that you demonstrated or displayed an egregious lack of remorse, that you knew or should have known that D.R.<sup>4</sup> was particularly vulnerable or incapable of resistance, and the jury also found that your conduct during the commission of the crime manifested deliberate cruelty to the victim. Given those findings, there is no way that I can justify a sentence in or even near the standard range.

...

The 102 months is eight and a half years...Each of these - - each of these aggravating factors, and I'll make the finding, that each of these aggravating factors by themselves would justify the sentence that I am imposing and I would base my sentence – the same sentence even if there was just one of these. Certainly with the combination of all of them, it more than justifies this sentence.

SRP 4-5. As argued above, there was sufficient evidence to sustain the findings for each of the aggravating factors alleged by the state. The trial court specifically held that any of the factors

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<sup>4</sup> The trial court uses the victim's first name. Hereafter, whenever the verbatim report of proceedings contains the victim's name the State will use initials.

would justify the sentence. SRP 5; CP 158. The sentence should be affirmed.<sup>5</sup>

**B. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING ARGUMENTS.**

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgeron*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prove prosecutorial misconduct, it is the defendant’s burden to show that the deputy prosecutor’s conduct was both improper and prejudicial in the context of the

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<sup>5</sup> The State is not addressing the future dangerousness issue because it was not listed as an aggravating factor as set forth by the trial court during sentencing and that is indicated in the Findings entered as Appendix 2.4 of the Judgment and Sentence. See SRP 4-5; CP 158.

entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn. 2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing State v. Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

### **1. The Deputy Prosecutor Did Not Improperly Appeal To The Passion And Prejudice Of The Jury.**

A prosecutor is not at liberty to appeal to the passion and prejudice of jurors by urging them to convict a defendant in a criminal action in order to protect their community from future law breaking, protect community values or preserve civil order. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011), *citing United States v. Solivan*, 937 F.2d 1146, 1153 (6<sup>th</sup> Cir. 1991). The reasoning being this prohibition is the possibility that jurors could be persuaded by such an appeal, believing they are helping their community, and the defendant is convicted for reasons other than his or her guilt or innocence. *Id.*

The deputy prosecutor in *Ramos* appealed to the jury during closing argument to stop Ramos from continuing to deal drugs at a parking lot located near a number of businesses the general public would frequent on a regular basis. *State v. Ramos*, 164 Wn. App. at 337-38. After arguing that on a specific date Ramos had delivered drugs, the deputy prosecutor stated,

This is also why we are here today, so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot. That's why they were there, that's why you're here, and that's why I am here, to stop Mr. Ramos from continuing that line of activities. That is what this

case is about and that's what the truth of the case is about and that's why this is a serious case.

*Id.* The State conceded that the deputy prosecutor “impermissibly argued that the jury should convict Ramos in order to eliminate drug dealing at Sunset Square.” *Id.* at 337. The State argued to the court that Ramos could not establish prejudice, but the court rejected the State’s argument. *Id.* at 340. The court stated that unlike a 6<sup>th</sup> Circuit case, the deputy prosecutor’s argument was not based on the evidence and was not an isolated incident of appealing to the community conscience. *Id.* at 340. The court determined that no jury instruction could have cured prejudicial effect of the deputy prosecutor’s improper appeal to the passion and prejudice of the jury. *Id.*

In the present case Williams argues to this court that the deputy prosecutor improperly appealed to the passion and prejudice of the jury by appealing to the community conscience. Brief of Appellant 24. Williams specifically alleges that the deputy prosecutor did this “in the context of future dangerousness and the potential for other victims.” Brief of Appellant 24. Williams alleges misconduct from the following statement of the deputy prosecutor during his closing argument: “[i]t’s getting worse as he went along.

It's a good thing it ended when it did." Brief of Appellant 21, *citing* RP 374.

When you put the entire statement by the deputy prosecutor in context, it is clear he is referring to the escalation of violence as testified to by the witnesses. "This violence escalated over the weeks he was there, started out with spanking, then moved on to that belt, and then a couple days before he leaves he gets this massive head injury. It's getting worse as he went along. It's a good thing that it ended when it did." RP 374. Due to the evidence that was presented at the trial regarding the repeated, escalating violence D.R. endured, which was evidenced by repeated beatings culminating in two black eyes and extremely swollen head D.R. had when he was returned to his grandmother, the deputy prosecutor's argument was not out of line. It was a single reference to the escalating nature of abuse D.R. suffered and while a bit over the top, did not implicate that Williams was going to go out and beat other children and that society should protect other children from Williams. The deputy prosecutor did not commit misconduct by impermissible appealing to the passion and prejudice of the jury.

## **2. The Deputy Prosecutor Did Not Improperly Instruct The Jury Or Misstate Facts Or Law.**

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

Williams asserts that the deputy prosecutor committed misconduct by misstating the law by arguing the jury could rely on knowledge in the gut and the heart to find an abiding belief and determine the State's charges. Brief of Appellant 21, 28. Williams also argues that the deputy prosecutor committed misconduct during his rebuttal closing by improperly equating common sense with speculation when he stated, "[n]owhere in the instructions does

it say you cannot speculate. In fact the instructions suggest you're supposed to use your common sense." Brief of Appellant 21, *citing* RP 465. Williams further argues that the deputy prosecutor's comments regarding speculation encouraged the jury to consider facts not in evidence and misstated the law. Brief of Appellant 26.

The second instruction to the jury states:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 116, *citing* WPIC 4.01. The deputy prosecutor discussed instruction two and offered the following regarding reasonable doubt and abiding belief:

So to be convinced beyond a reasonable doubt, you do not have to be convinced beyond all doubt. Reasonable doubt is not 100 percent. If reasonable

doubt really was a 100 percent, we would never convict anyone of anything. You could never be 100 percent about anything. Unless you could travel back in time and at the same time reading people's minds while watching what happens, you're never going to be 100 percent. Just because a scenario is possible doesn't make it reasonable. So when you're trying to figure out whether a doubt that you have might be reasonable or not, just because it is possible does not make it reasonable. It's possible I might win the lottery tomorrow. It is not reasonable to think that's going to happen, though.

The question is do you have an abiding belief that this happened. Abiding belief is something you can know in your mind, something you can get from your heart, or something you can know in your gut. Do you have an abiding belief that this happened.

RP 430-31. In context this is not a misstatement of the law, or asking the jurors to decide the case based upon evidence that was not presented. Belief is not defined in the instructions so we look to its plain meaning. Belief is defined as, "a state or habit of mind in which trust, confidence or reliance is placed in some person or thing: FAITH." Webster's Third New International Dictionary of the English Language, 200 (2002 ed.). Common sense would tell us that a belief is based upon one's evaluation of the information one has received on a given matter and that evaluation necessarily includes how one feels, whether in one's heart or one's gut, about that information. That is the trust, confidence or reliance, otherwise stated as faith, in the matter.

The jury heard the case and they are able to make the credibility determinations based upon what they witnessed at the trial, the testimony and demeanor of witnesses and evidence presented. CP 114. This argument by the deputy prosecutor, in context, does not misstate the law or ask the jury to consider facts outside the evidence presented and is therefore not misconduct.

Williams next argues that the deputy prosecutor improperly told the jury it could speculate. Williams's trial counsel made the following argument to the jury during his closing argument:

Number 11 talks about substantial bodily harm. And one of the aspects of it that there has to be substantial loss or impairment of a function of any bodily part or organ. Now, Mr. Hayes has said his eyes was swollen, and, therefore, it impaired his vision. Where is the evidence of that? You know, he says, well, look at his eyes, you can see they're swollen and, therefore, it has to impair his vision. You're not allowed to speculate and that's exactly what the prosecutor is asking you to do, speculate. A lot of his closing had to do with speculate. You know you can't do it. You need to take a look at the evidence as it was presented.

RP 447. The deputy prosecutor in his rebuttal closing addresses Williams's trial counsel's argument regarding speculation in the context of direct and circumstantial evidence. RP 465. The deputy prosecutor stated:

The simplest explanation is that he beat the living daylight out of D.R. for those three weeks. Counsel

says you can't speculate. That's not accurate. Nowhere in the instructions does it say and you cannot speculate. In fact, the instructions suggest you're supposed to use your common sense...

Instruction number three suggests this when it talks about circumstantial evidence. Circumstantial evidence is facts or circumstances from which the existence or nonexistence of any other facts may be reasonably inferred from common experience. So you can decide the facts are present when you look at the evidence and use your common experience. To say you cannot speculate, that's not accurate.

RP 465, *citing* CP 117, WPIC 5.01. When the argument is looked at in totality it is not a misstatement of the law. A prosecutor has wide latitude in his rebuttal to address issues raised by the defense in their closing. *State v. Lewis*, 156 Wn. App. at 240.

Williams argues that the deputy prosecutor is asking the jury to go beyond the evidence into the realm of speculation to support a guilty verdict. Brief of Appellant 28. That is clearly not what the deputy prosecutor is arguing. The first definition given for speculate in Webster's is, "to ponder a subject in its different aspects, relations, and implication: indulge in contemplation: evolve ideas or theories by mental reexamination of a subject or matter and usu. without experimentation or introduction of new data." Webster's Third New International Dictionary of the English Language, 2118 (2002 ed.). This is what the State was telling the

jury it could do, in respect to circumstantial evidence. The jury could look at the evidence, or lack thereof, and through common experience contemplate the different aspects and relations to come to a conclusion. This is not a misstatement of the law and is not prosecutorial misconduct.

**3. If This Court Were To Find That The Deputy Prosecutor Committed Misconduct, Williams Was Not Prejudiced And The Misconduct Was Therefore Harmless Error.**

The State does not concede that any of the statements the deputy prosecutor made were improper. Arguendo, if this court were to find any or all of the statements improper and misconduct, the State argues that any such misconduct was harmless error. Williams has the burden of showing the misconduct was prejudicial considering the context of the entire record. *State v. Gregory*, 158 Wn.2d at 809. The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *State v. Monday*, 171 Wn. 2d at 675. Because Williams's trial counsel did not object to the statements of the deputy prosecutor he must show that a curative instruction would not be sufficient to eliminate the prejudice his client allegedly suffered due to the deputy prosecutor's improper statements. *State v. Belgrade*, 110 Wn.2d at 507. The question becomes, when evaluating the entire

record, “is there a substantial likelihood that the prosecutor’s misconduct affected the jury verdict, thereby denying the defendant a fair trial”? *State v. Davenport*, 100 Wn.2d at 762-63.

Williams argues that the deputy prosecutor’s improper statements denied Williams a fair trial because there is a substantial likelihood that the arguments affected the outcome of the jury’s verdict. This is simply not the case. The totality of the evidence in this case was so overwhelming, the pictures, the statements from the witnesses, including Williams’s own testimony and statement to Detective Sergeant McNamara, that there is not a substantial likelihood that the deputy prosecutor’s misconduct affected the outcome of the jury verdict. This court should affirm Williams’s conviction.

**C. WILLIAMS RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT THE PROCEEDINGS, INCLUDING CLOSING ARGUMENT.**

To prevail on an ineffective assistance of counsel claim Williams must show that (1) the attorney’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney’s conduct

was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Williams argues his trial counsel was ineffective for failing to object to the alleged improper statements the deputy prosecutor made during his closing arguments, as argued in the previous section. As the State argued above, the deputy prosecutor's comments were not improper and did not constitute misconduct. Therefore, Williams's trial counsel was not ineffective for failing to object because there was no reasonable reason to object.

**IV. CONCLUSION**

For the reasons argued above this court should affirm Williams's conviction for Assault of a Child in the Second Degree and affirm the exceptional sentence.

RESPECTFULLY submitted this 6<sup>th</sup> day of April, 2012.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
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Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

**April 06, 2012 - 9:31 AM**

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